FILED
AUG 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-101

In The

Supreme Court of the United States

October Term, 1997

PATRICIA McCAFFREY, GERALD HILL, RON LUNDY,

Petitioners,

vs.

OONA R.-S.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NANCY J. LoDOLCE
McCANN & DOLCE
645 Fourth Street
Suite 214
Santa Rosa, California 95401
(707) 544-4600

DESIREE OLIVIA COX
Counsel of Record
404 Mendocino Avenue
Suite 200
Santa Rosa, California 95401
(707) 527-1016

Attorneys for Respondent

143086

(800) 274-3321 • (800) 359-6859

COUNSEL PRESS

QUESTION PRESENTED

Was the law clearly established in 1992-93 that pervasive sexual harassment of a 6th grade female student by her male student-teacher and peers would violate her federal civil rights?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Misstatements of Fact and Law in Petitioners' Statement of the Case 1

Reasons for Denying the Writ 2

I. There Is No Compelling Reason To Grant. ... 2

A. The Ninth Circuit Limited Its Decision To The Only Issue Appropriate In This Interlocutory Appeal. 2

B. Petitioners Cannot Use The "Qualified Immunity" Doctrine To Justify This Court's Consideration Of Whether They Can Be Sued Under 42 U.S.C. § 1983. 5

1. No Comprehensive Enforcement Scheme 4

2. Correct Assumption 5

3. Correct Application of Standard 6

Table of Cited Authorities

	Page
C. The Circuit Court Correctly Determined That In 1992-93 A Reasonable School Official Would Have Known That Pervasive Sexual Harassment Of Respondent By Her Male Student Teacher And Peers Would Violate Her Federal Civil Rights.	7
D. The Questions Whether Petitioners Can Be Sued Under 42 U.S.C. § 1983 and Whether Title VII Standards Are An Appropriate Analogue For Title IX Liability Should Not Be Considered By This Court.	11
Conclusion	15

TABLE OF CITED AUTHORITIES

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987)	8, 10
Anderson v. Green, 115 S. Ct. 1909 (1995)	13
Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994)	2
Cannon v. University of Chicago, 441 U.S. 677 (1978)	5
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	3

Table of Cited Authorities

	Page
Crawford-El v. Britton, 118 S. Ct. 1584 (1998)	5, 6, 7
Davis v. Passman, 442 U.S. 228 (1979)	5
Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc) (petition for cert. filed, November 19, 1997)	12
Digital Equipment Corp. v. Desktop Direct, Inc., 128 L. Ed. 842 (1994)	4
Doe v. Petaluma Sch. Dist., 54 F.3d 1447 (9th Cir. 1995)	2
Elder v. Holloway, 510 U.S. 510 (1994)	8
Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)	2, 8
Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60 (1992)	2, 4, 5, 7
Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998)	10, 11, 13, 15
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	5
Kerr v. United States District Court, 526 U.S. 394 (1976)	12
Ketchum v. Alameda County, 811 F.2d 1243 (9th Cir. 1987)	2

Table of Cited Authorities

	Page
Lindsey v. Shalmy, 29 F.3d 1382 (9th Cir. 1994)	2
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1996)	7
Mitchell v. Forsyth, 472 U.S. 511 (1984)	3, 8
Oona R.-S. v. Santa Rosa City Schools, No. CV-94-0623-TEH, reported at 890 F. Supp. 1452 (N.D. Cal. 1995)	1
Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3rd Cir. 1990)	6, 12
Rowinski v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) ...	12
Siegert v. Gilley, 500 U.S. 226 (1991)	6, 7
Swint v. Chambers County Commission, 131 L. Ed. 2d 60 (1995)	3, 4
United States v. Lanier, 137 L. Ed. 2d 432 (1997) ...	8, 9, 10
Urie v. Thompson, 337 U.S. 163 (1949)	14
Virginia Military Institute v. United States, 508 U.S. 946 (1993)	13
Waid v. Merrill Area Pub. Schools, 91 F.3d 857 (7th Cir. 1996)	6, 13

Table of Cited Authorities

	Page
Washington v. Davis, 426 U.S. 229 (1976)	2
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978)	12
Williams v. School Dist. Of Bethlehem, PA, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994)	6
Statutes Cited:	
18 U.S.C. § 242	9
42 U.S.C. § 1983	*passim*
United States Constitution Cited:	
Fourteenth Amendment	2, 9
Rules Cited:	
United States Supreme Court Rule 10	11
United States Supreme Court Rule 11	11
Other Authorities Cited:	
Justice Brennan, *Some Thoughts On The Supreme Court's Workload*, 65 JUDICATURE 230 (1983)	13
Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n. 541 (1958)	14

Table of Cited Authorities

	Page
Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 U. Va. L Rev. 197 (1975)	14
6 Moore's Federal Practice § 511.02 [2] (Matthew Bender 3d ed.)	11
Stern, et al., *Supreme Court Practice*, 7 ed. § 2.11 ...	13
Justice Stevens, *Some Thoughts On Judicial Restraint* 66 JUDICATURE 177 (1982)	14

Respondent Oona R.-S. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 143 F.3d 473 (9th Cir. 1998) and replicated in petitioner's Appendix ("Pts' App") A beginning at page 1a. The Court should deny the petition because there is no compelling reason to grant it. A close analysis of the petition reveals that petitioners misrepresent the nature and breath of the opinion below and attempt to "bootstrap" issues appropriately left for final judgment onto the qualified immunity issue correctly decided by the Court of Appeal. This Court should refuse to entertain the remainder of petitioners' specious legal arguments, which have already been rejected by the District and Circuit Courts below, and allow respondent to proceed forward to her rightful day in court.

MISSTATEMENTS OF FACT AND LAW IN PETITIONERS' STATEMENT OF THE CASE

The petition contains a number of misstatements of fact and law which must be brought to the attention of this Court. First, petitioners have not been sued under 42 U.S.C. § 1983 for hostile environment sexual harassment "by third parties" but for their own "deprivation of rights conferred on [respondent] by Title IX and the Fourteenth Amendment [Equal Protection Clause]." *See Oona R.-S. v. Santa Rosa City Schools*, No. CV-94-0623-TEH, reported at 890 F. Supp. 1452 (N.D. Cal. 1995) and replicated in Pts' App C at 24a. Second, respondent Oona R.-S. does allege that her sixth grade teacher, Patricia McCaffrey, "personally participated" in sexually harassing conduct against her by: (1) creating and maintaining a "class log" procedure wherein McCaffrey's class, as opposed to McCaffrey, responded to sexual harassment complaints; (2) not disciplining the boys Oona complained about, in McCaffrey's presence, in that class log procedure and; (3) engaging in multiple acts of retaliation against Oona after she

and her mother complained about the openly hostile environment in McCaffrey's sixth grade class. Pts' App C at 17a-23a. Third, the opinion below was not predicated "solely" on this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), but also on the texts of the Equal Protection Clause of the Fourteenth Amendment and Title IX, and the following judicial opinions: *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Doe v. Petaluma Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991); *Ketchum v. Alameda County*, 811 F.2d 1243, 1247 (9th Cir. 1987); and *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994). Pts' App A at 6a-10a.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON TO GRANT.

A. The Ninth Circuit Limited Its Decision To The Only Issue Appropriate In This Interlocutory Appeal.

The *only* issue before the Court of Appeal in this case was

> whether [the District Court] correctly determined that the individual defendants were not entitled to immunity, because in 1992-93 reasonable school officials would have known that the [sexually harassing] conduct alleged by plaintiff would violate [her] federal [civil] rights.

Pts' App A at 5a. The Court of Appeal correctly held that petitioners were not entitled to qualified immunity, based upon

the constitutional provision, statute, and cases set out above. The Court stressed that the issue before it was very "narrow" and that it held *only* that "in this district the [duties of school officials] to take reasonable steps to remedy a known hostile environment created by a [student's peers]" and to "respond to complaints of harassment and discrimination" by a student against a student-teacher were "clearly established" during the relevant time period. Pts' App A at 10a-11a. The remainder of the decision is, therefore, dicta.

An official defendant claiming qualified immunity is entitled to immediate appeal of *only* the narrow and purely legal question of "whether the facts alleged . . . support a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1984). All other appeals must await a "final decision" of the district court, unless review may be had directly to this Court. 28 U.S.C. § 1291; *Swint v. Chambers County Commission*, 131 L. Ed. 2d 60, 69 (1995). This "final decision" rule has been interpreted to include *only* those decisions that are

> conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). None of these criteria are met in this case.

Claims of a "right not to be tried" under any of the above-stated criteria must be viewed with "skepticism, if not a jaundiced eye," because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.' " *Swint v. Chambers County Commission, supra*, 131 L. Ed. 2d at 70,

citing *Digital Equipment Corp. v. Desktop Direct, Inc.*, 128 L. Ed. 842 (1994). For example, a "mere defense to liability" is not immediately appealable because an erroneous ruling on liability "may be reviewed effectively on appeal from final judgment." *Swint v. Chambers County Commission, supra*, 131 L. Ed. 2d at 70.

B. Petitioners Cannot Use The "Qualified Immunity" Doctrine To Justify This Court's Consideration Of Whether They Can Be Sued Under 42 U.S.C. § 1983.

In a series of rather convoluted arguments, petitioners inappropriately attempt to use the "Qualified Immunity" doctrine to convince this Court to consider the issues of whether they can be sued under 42 U.S.C. § 1983. First, they argue that because Title IX has a "comprehensive enforcement scheme" respondent is precluded from suing them under that section. Second, petitioners assert that the Circuit Court wrongfully "assumed" that they can be sued under § 1983. Third, they argue that the Circuit Court did not properly apply the "heightened pleading standard" necessary in analyzing respondent's § 1983 claims. These arguments are all without merit, as will be shown, seriatim, below.

1. *No Comprehensive Enforcement Scheme*

This Court has expressly held that Title IX does *not* contain a remedial scheme comprehensive enough to cure intentional discrimination against a student victim. *See Franklin v. Gwinnette County Public Schools*, 503 U.S. 60, 74-76 (1992). In *Franklin*, the Court held that monetary damages had to be made available for an injured Title IX plaintiff, or she would be "remediless." *Id.* at 76. This decision was based on the deeply rooted legal principle that courts must *presume* "the availability of all appropriate remedies" under a federal statute,

unless Congress has expressly indicated otherwise. *Id.* at 66, citing *Davis v. Passman*, 442 U.S. 228, 246-247 (1979). Congress has made no such indication in relation to Title IX. This Court earlier addressed the lack of comprehensiveness of Title IX's enforcement scheme in *Cannon v. University of Chicago*, 441 U.S. 677 (1978), as follows:

> [The Court has] never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute. . . . Title IX not only does not provide such a mechanism, but the complaint procedure . . . does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.

Id. at 706 n.41 (citations omitted). Therefore, Title IX does not contain a comprehensive enforcement scheme sufficient to preclude a Section 1983 action.

2. *Correct Assumption*

Petitioners allege that the Circuit Court wrongfully "assume[d] without any analysis" that they could be sued under 42 U.S.C. § 1983. This is exactly the correct assumption for a court to make when confronted with a qualified immunity defense. In the recent case of *Crawford-El v. Britton*, this Court pointed out that in the leading case on qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as well as others, the courts correctly "assumed that [the plaintiff] would be entitled to prevail but for the immunity defenses." *Crawford-*

El v. Britton, 118 S. Ct. 1584, 1592 (1998), citing *Siegert v. Gilley*, 500 U.S. 226 (1991). Petitioners appear to confuse *Siegert's* requirement that the court determine whether respondent has "asserted" a violation of a constitutional (or statutory) right with the requirement that the court ultimately determine whether respondent has "proven" her claim. The Circuit Court did not conclusively "[establish] a Section 1983 cause of action" against petitioners. Its decision, therefore, is not in "direct conflict" with either the Third Circuit in *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3rd Cir. 1990) and *Williams v. School Dist. Of Bethlehem*, PA, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) nor the Seventh Circuit in *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996). Each of these cases involved an appeal of summary or final judgment and had nothing whatsoever to do with qualified immunity.

3. *Correct Application of Standard*

Petitioners incorrectly assert that the Circuit Court did not "properly [apply]" the "heightened pleading standard" requiring that respondent state "nonconclusory allegations of their intent" to discriminate against her on the basis of her sex. As explained by this Court in *Crawford-El v. Britton*, *supra*, 118 S. Ct. at 1596, this is not the *circuit court's* job to do:

> "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the *trial court* must exercise its discretion in a way that protects the substance of the qualified immunity defense" and "may insist that the plaintiff put forward specific, nonconclusory factual allegations" that establish improper motive . . . causing injury in order to survive a prediscovery motion for dismissal.

Id. at 1596-97, citing *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (KENNEDY, J., concurring in judgment) (emphasis added). The District Court below expressly analyzed this question and determined that respondent had, in fact, met this standard against petitioners. Pts' App C at 40a-48a. The District Court's careful exercise of its discretion in this regard is illustrated by the fact that it required respondent to amend her Complaint to allege more specific nonconclusory facts of intentional discrimination against three other defendants, and when she couldn't sufficiently allege such facts, dismissed these defendants from the case. Pts' App C at 47a, note 21, 48a, note 22, 55a, note 28.

C. The Circuit Court Correctly Determined That In 1992-93 A Reasonable School Official Would Have Known That Pervasive Sexual Harassment Of Respondent By Her Male Student Teacher And Peers Would Violate Her Federal Civil Rights.

As pointed out above, this Court's decision in *Franklin v. Gwinnett County Public Schools*, was not the "sole ground" for the Circuit Court's denial of qualified immunity in this case. The Court also relied on the statutory language of Title IX and the Equal Protection Clause, and cases establishing and interpreting respondent's right to freedom from purposeful sex discrimination under them, recognized "[w]ell prior to 1988." Pts' App A at 6a-11a. The circuit court did focus its Title IX analysis on the *Franklin* case, recognizing its importance in treating Title IX and Title VII as "analogous for purposes of sexual harassment claims." Pts' App A at 7a. Of special interest to the Circuit Court was the fact that this Court relied on the leading Title VII "hostile environment" case, *Meritor Sav. Bank, FSB v. Vinson*, in support of its decision in *Franklin*, a Title IX case. This caused the Circuit Court to believe that the *Franklin* case had established that school officials had a duty to "remedy known sexual harassment under Title IX," similar

to an employer's duty under Title VII. Pts' App A at 7a-8a. Because the Ninth Circuit had also expressly held that "hostile environments include[d] peer harassment" in the Title VII context in *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991), it concluded that in its Circuit, at least, the law was clearly established in the 1992-93 school year that petitioners had a "duty to take reasonable steps to remedy a known hostile environment created by a peer." Pts' App A at 9a, 10a.

A court may refer to decisions in the Courts of Appeals to determine whether a right was "clearly established." *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Courts of Appeals decisions are certainly "relevant authority" in a qualified immunity inquiry. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). A defendant is not entitled to qualified immunity if the "contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In fact,

> "general statements of law" may give "fair and clear warning" of a constitutional or statutory right, and "a general constitutional [or statutory] rule already identified in the decisional law" may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

United States v. Lanier, 137 L. Ed. 2d 432, 446 (1997), citing *Anderson, supra*, 483 U.S. at 64.

In *Lanier*, this court considered a Sixth Circuit Court of Appeals' reversal of a state judge's conviction of criminally violating the constitutional rights of five women by sexually

assaulting them while serving as judge.[1] *United States v. Lanier*, *supra*, 137 L. Ed. 2d 432. The jury found that the defendant had deprived the victims of the Fourteenth Amendment due process right to liberty, which included the right to be free from sexually motivated physical assaults and coerced sexual battery. *Id.* at 440. A panel of the Court of Appeals for the Sixth Circuit affirmed the conviction, but the full Court vacated that decision and granted rehearing en banc. *Id.*

On rehearing, the Sixth Circuit Court set aside the convictions for lack of any notice to the public that the criminal statute in question covered simple or sexual assault crimes, holding that liability could only be imposed if the constitutional right said to have been violated had been specifically "identified in a decision of [the Supreme Court]" and held to apply in a factual situation "fundamentally similar" to the one at bar. *Id.* This Court granted certiorari to review the standard for determining when particular conduct "falls within the range of . . . liability . . . [under a federal statute]". *Id.* at 441.

The *Lanier* Court vacated and remanded, holding that the Sixth Circuit had applied the "wrong standard" in determining liability, by crafting a standard substantially higher than the "clearly established" standard used for qualified immunity in civil cases under 42 U.S.C. § 1983. *Id.* at 445. This Court noted that in many cases, "neither the [federal] statutes nor . . . their constitutional referents delineate the range of forbidden conduct [under them] with particularity" and indicated that the "touchstone is whether the statute, either

---

1. While this case involved a violation of 18 U.S.C. § 242 (making it a criminal offense to act willfully and under color of law to deprive a person of rights protected by the Constitution or laws of the United States) and the Judge's alleged violation of the due process clause of the Fourteenth Amendment, the Court analyzed it under the "clearly established" rule under 42 U.S.C. § 1983.

standing alone or as construed by the courts, made it reasonably clear . . . that the conduct was [wrong]." *Id.* at 438. Thus, in some cases a "general constitutional rule" previously identified in decisional law may apply to conduct in question, even though "the very action in question has [not] previously been held unlawful." *Id.* at 446, citing *Anderson v. Creighten*, *supra*, 483 U.S. at 640.

Based upon this analysis, this Court should find that respondent's constitutional and statutory right to be free from discrimination, harassment and retaliation, because of her gender, was clearly established in 1992-93.

While not controlling, it is important to examine this Court's recent Title IX decision in *Gebser v. Lago Vista Independent School District*, in analyzing this issue. *Gebser* addressed the question of when a school district may be held liable under Title IX for a teacher's sexual harassment of a student.[2] This Court rejected agency principles resting on respondeat superior or constructive notice and held, instead, that an educational institution's liability rests on its own "official decision . . . not to remedy the violation." *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1997 (1998). Thus, a Title IX violation occurs when a school official with authority to address and correct gender discrimination

---

2. While the plaintiffs in *Gebser* originally asserted 42 U.S.C. § 1983 claims against the school district and its teacher, summary judgment was granted in favor of defendants on these claims by the District Court for the Western District of Texas and plaintiffs appealed only their Title IX claim against the District to the Fifth Circuit Court of Appeals and, ultimately, this Court. *Gebser v. Lago Vista Independent School District*, *supra*, 118 S. Ct. 1989, 1993-1994 (1998). Consequently this Court expressly stated that the decision "does not affect any right of recovery that an individual may have against [a] teacher in his individual capacity under . . . § 1983." *Id.* at 2000.

has actual knowledge of it and fails to adequately respond. *Id.* at 1999.[3] This holding is strikingly similar to the Circuit Court's decision in the instant case that school officials may be liable "for their own discriminatory actions in failing to remedy a known hostile environment." Pts' App. A at 9a. Thus, both this Court and the Ninth Circuit have held that, whether directly under Title IX, or under Section 1983, petitioners can only be held liable for their own wrongful acts, not those of "third parties."

D. The Questions Whether Petitioners Can Be Sued Under 42 U.S.C. § 1983 and Whether Title VII Standards Are An Appropriate Analogue For Title IX Liability Should Not Be Considered By This Court.

Petitioners seek expedited review of the questions whether they can be sued under 42 U.S.C. § 1983 and whether Title VII standards should be applied in their Title IX case. In order to obtain this review, petitioners must show not only that the petition has merit under generally applicable standards for granting certiorari (Rules of the Supreme Court, Rule 10), but also that the "imperative public importance of the case" and the "immediate need for Supreme Court Review" justify the Court's deviation from the normal flow of appellate review. Rules of the Supreme Court, Rule 11, 6 Moore's Federal Practice § 511.02 [2] (Matthew Bender 3d ed.). Petitioners cannot meet either of these requirements.

This Court should not consider petitioners' first and second "Questions Presented" because neither was squarely addressed by the Circuit Court and neither is ripe for review. While the

---

3. The lack of response by the District must amount to "deliberate indifference" to the discrimination suffered by the plaintiff in order to be actionable. *Gebser v. Lago Vista Independent School District, supra,* 118 S. Ct. at 1999.

Court implied that respondent could state a § 1983 claim against petitioners, it certainly did not issue a "final judgment" on the question. Similarly, while the Court stated that it believed that "Title VII standards apply to hostile environment claims under Title IX," it specifically refused to consider "what steps school officials may reasonably be required to take to address harassment by fellow students," "when they are required to take them," and/or the extent to which any such steps "may differ from the action reasonably expected of employers to remedy harassment by fellow employees."

A writ of certiorari should issue only in "extraordinary circumstances" where the petitioner has shown that the right to issuance is "clear and undisputable" and that he has "no other adequate means to attain the relief he desires." *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 n.7 (1978). It is in the interest of "fair and prompt administration of justice" to discourage piecemeal litigation because Congress has determined that as a general rule appellate review should be postponed until after a "final judgment" has been rendered by the trial court. *Kerr v. United States District Court*, 526 U.S. 394, 402-403 (1976). A judicial readiness to issue a writ in anything other than an "extraordinary situation" runs the risk of defeating this Congressional intent. *Id.*

While petitioners assert that there are a number of Circuit Court decisions in "direct conflict" with this case on the above-stated questions, this is simply not true. Each of the cases they cite in support of granting the writ on these issues have significant procedural, factual, and legal differences. For example, *Davis II* and *Rowinski* involved appeals of a *dismissal* and *summary judgment*, respectively, in favor of a school board and district, of Title IX claims for student-on-student harassment. Neither case dealt with the preliminary procedural issue of qualified immunity for school employees. Similarly, *Pfeiffer*

and *Waid* each involved an appeal of a *judgment* (the first a trial judgment and the second a summary judgment) in favor of defendant, holding that plaintiff could not bring a § 1983 claim in conjunction with a Title IX claim. The issue of qualified immunity was not addressed in either case.

A mere inconsistency in dicta or general principles utilized by two circuit courts does not suffice to grant certiorari; the conflict must be "real" and "intolerable." Stern, et al., *Supreme Court Practice*, 7th ed. § 2.11. Justice Brennan said that this Court has "made mistakes in granting certiorari at an interlocutory stage," when allowing the case to proceed to its final disposition "might produce a result that makes it unnecessary to address an [important and difficult question]". Justice Brennan, *Some Thoughts On The Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Thus, he believed that this Court should not address issues "if there is a way properly to avoid doing so." *Id.* If further proceedings might affect the issue on which certiorari is sought, the Court should ordinarily deny the writ. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). A case is not ripe for review when there is no justiciable controversy, in its current posture, before the Court. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995).

The fact that petitioners are only able to point to two (2) Circuit Court decisions allegedly in conflict over each of the above-stated questions illustrates why this Court should not grant review. While Title IX jurisprudence is a rapidly developing area of law, there has been insufficient time for the Courts of Appeal to fully analyze the above-stated questions, perhaps reach a consensus, and/or develop a satisfactory majority view among the lower courts. This is particularly true in light of this Court's recent decision in *Gebser v. Lago Vista Independent School District*, *supra*, deciding the standard of

liability to be imposed on school districts for violations of Title IX in teacher-on-student sexual harassment cases.

When there are cases pending in the lower courts that may well resolve a conflict, or more clearly frame the issue that is the subject of a conflict, certiorari may be denied notwithstanding the existence of the conflict. *See* Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 U. Va. L Rev. 197, 202 (1975). Differing rules of federal law in various sections of our great country is "not always an intolerable evil" because the existence of conflicting interpretations may help illuminate an issue before it is finally resolved and, ultimately, play a constructive role in the lawmaking process. Justice Stevens, *Some Thoughts On Judicial Restraint* 66 JUDICATURE 177, 183 (1982).

The doctrine of judicial restraint teaches that patience in the judicial resolution of conflicts may sometimes produce the most desirable results. *Id.* Thus, a conflict of decisions should only result in the granting of a writ where is it clear that the conflict is one that can be effectively resolved "by the Supreme Court alone" and the disagreement among the lower courts is one that must be promptly resolved. Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n. 541, 552 (1958). There are no such compelling reasons in this case, and therefore, petitioners' writ should be denied.

If petitioners' writ of certiorari is denied at this, the interlocutory stage, they are not prejudiced to renew the questions presented when they later seek a writ from the final judgment. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the Court deny petitioners' writ of certiorari in its entirety. If the Court is not inclined to deny the writ, then respondent requests that the Court grant the writ, vacate the judgment below, and remand the case for reconsideration in light of *Gebser v. Lago Vista Independent School District*, *supra*.

Respectfully submitted,

DESIREE OLIVIA COX
Counsel of Record
404 Mendocino Avenue
Suite 200
Santa Rosa, California 95401
(707) 527-1016

NANCY J. LoDOLCE
McCANN & DOLCE
645 Fourth Street
Suite 214
Santa Rosa, California 95401
(707) 544-4600

Attorneys for Respondent